

**Testimony of
Dr. Michael Mortimer
on behalf of the Society of American Foresters**

**November 15, 2005
Washington , DC**

**Before the House Committee on Agriculture, regarding review of recent litigation
on Forest Service firefighting and forest health efforts.**

Mr. Chairman, members of the committee, I am pleased to have the opportunity to appear before you today to discuss a pressing national forest management issue. While I am a member of the forestry faculty at Virginia Tech, I wish to make my comments today on behalf of the Society of American Foresters and its 15,000 forestry professionals.

The National Environmental Policy Act or the NEPA has been in effect for nearly 40 years. Its dual requirements to involve the public and to analyze the potential environmental impacts of major federal actions have provided safeguards against careless development and unforeseen consequences.

In enacting NEPA, Congress provided a useful mechanism for categorically excluding from environmental analysis smaller projects that afford very little risk in the way of environmental impacts and those projects considered emergency actions. These actions should be expeditiously implemented and warrant exemption from administrative appeals. SAF supports the recently introduced legislation, HR 4091, which would respond to a recent court decision hindering timely implementation of actions that have insignificant environmental impact.

The Forest Service currently has several categorical exclusions as allowed under the NEPA including those that are components of the Healthy Forests Initiative (HFI) and the Healthy Forests Restoration Act (HFRA) (P.L. 108-148). These exclusions aide in reducing hazardous fuels, addressing insect and disease outbreaks, and rehabilitating forests after events. Each of the HFI/HFRA categorical exclusions include specific limitations on the size of the projects, which vary from 70 acres for limited harvesting to 4,500 acres for prescribed burning; road building; silviculture applications; and herbicide and pesticide use. These categorical exclusions cannot be used in wilderness or wilderness study areas. Additionally, each includes provisions for how the public will be involved in the process. The wildfire risk reduction categorical exclusion in particular mandates that projects be developed through the collaborative process of the 10 Year Comprehensive Strategy for Implementing the National Fire Plan.

Because of the insignificant environmental impacts of these projects and the public involvement afforded through regulatory mandates in the exclusions, the forest planning process, project scoping, and litigation, these projects do not need to be further subjected to the administrative appeals process. It is important to note that these forest health-related categorical exclusions require full compliance with environmental laws.

Additionally, projects implemented using these exclusions must still be consistent with the forest management plans required under the National Forest Management Act that are developed with significant public involvement and environmental analysis. Use of categorical exclusions relies upon the science and experiential knowledge of forest managers who have implemented these forest management practices for decades.

An agency is not free to develop categorical exclusions in any manner it sees fit. Categorical exclusions cannot be applied arbitrarily or haphazardly as the Forest Service discovered in the 1999 Heartwood decision.¹ In contrast, when developing the HFI categorical exclusions, the Forest Service conducted extensive analysis of these types of projects and came to the conclusion that these actions result in insignificant environmental effect. In addition, forest managers need these exclusions to quickly respond to emergencies and reduce the threats to the nation's forests.

SAF strongly believes that by their nature and with the limitations outlined in the regulations, the forest health projects allowed under the HFI and HFRA categorical exclusions should be excluded from further environmental analysis. These categorical exclusions can provide the Forest Service with a means to accelerate accomplishment of urgent projects on the ground. However, the agency cannot take full advantage of the efficiencies offered by these categorical exclusions without relief from the current statutory appeals process.

Judge Singleton's recent ruling in the Earth Island Institute case² has unfortunately clouded the relationship between categorical exclusions and the appeals process. While the court clearly recognized that the Appeals Reform Act "certainly permits exclusion of environmentally insignificant projects from the appeals process," the court does not seem to understand that what it is describing are in fact categorically excluded projects.

The court then compounds this problem by creating an artificial distinction where none exists. The court held that "While the Forest Service is clearly not required to make every minor project it undertakes subject to the appeals process, it is required to delineate between major and minor projects..." The court's apparent logic being that minor projects do not require an appeals process, whereas major projects do.

There is no such distinction between major and minor in the Council on Environmental Quality's definition of categorical exclusion. The critical question in NEPA is instead whether actions will significantly impact the human environment. The size or scope of the project is irrelevant, only the environmental impacts are of concern. What Judge Singleton has done is create a new test to determine whether a categorical exclusion is appealable based on whether it is a major or minor action. Since this major vs. minor distinction is not currently defined, only another judge, on a case by case basis, can decide that question conclusively unless Congress acts to remedy this situation. The Earth Island Institute case has inappropriately blended the NEPA process with the

¹ *Heartwood v. U.S. Forest Service*, 73 F. Supp. 2d 962 (S.D. Ill 1999) *aff'd* 230 F.3d 947 (7th Cir.(Ill.)2000).

² *Earth Island Institute v. Pengilly*, Case No. CIV F-03-6386 JKS (E.D. CA 2005).

appeals process. The consequence is uncertainty for the agency and undoubtedly additional lawsuits challenging the use of categorical exclusions.

Recent research on Virginia's national forests³ has shown that the appeals process inevitably slows down implementation of categorically excluded projects—in the cases we examined, the public comment and appeal processes added an average of four (4) months, essentially doubling the implementation time for what should have been quickly completed, low impact projects:

- One of the projects, designed to address a southern pine bark beetle infestation, would have harvested only 40 acres, prescriptively burned 70 acres, and constructed only 1/3 of a mile of road. Appeals added seven (7) months to the project, only to have litigation delay it another thirteen (13) months.

- Two categorically excluded timber salvage sales, totaling a mere 150 acres of restoration work, were nonetheless appealed, again doubling the amount of time needed to implement the projects.

- Most discouragingly, a research project designed to test the efficacy of various gypsy moth pheromone treatments did not in fact qualify for a categorical exclusion. That project, designed to treat less than 1000 acres not only failed to qualify for a categorical exclusion, but was subsequently appealed and litigated. While the Forest Service prevailed, the time elapsed was nearly two years. Two years to implement a small-scale forest health research project is unacceptable.

It is also worthwhile noting that in none of the appealed categorical exclusion projects we studied did the information raised on appeal lead to the reversal of the original Forest Service decision. It was in fact troubling that so many concerns were raised during the post-decisional period that could have been raised prior to the land manager's decision had the appellants truly wanted to contribute to improving the projects and the agency decisions.

In closing, as I was helping to coordinate the State of Montana's post-fire efforts on its forest lands in the Bitterroot Valley following the catastrophic fire season in the year 2000, it was painful to watch the NEPA and appeals processes grind down the Forest Service's ability to respond promptly to the crisis on its national forest lands. Categorical exclusions can restore common sense to how the NEPA is applied. Mr. Chairman, it is undeniably important that efforts with H.R. 4091, to codify the exemption of categorical exclusions from the appeals requirements of the Appeals Reform Act, move forward. The recent decision by Judge Singleton in the California District court is unfortunate, and demands that Congress clarify how categorical exclusions and the Forest Service appeals

³ Scardina, A. 2003, Public involvement in USDA Forest Service project-level decision making: A qualitative analysis of public comments, administrative appeals, and legal arguments from case studies on the George Washington & Jefferson National Forests. Master of Science Thesis, Virginia Polytechnic Institute and State University. Blacksburg, VA.

process fit together. The Society of American Foresters supports your initiative, and supports efforts to restore the ability of the Forest Service to act in a timely fashion to address forest health and other land and resource management needs on the national forests.

Thank you.

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EDUCATION:

**University of Montana
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Doctor of Philosophy
Forestry (Natural Resource Policy)
2001**

**Pennsylvania State University
The Dickinson School of Law**

**Carlisle, Pennsylvania
Juris Doctor
1991**

Washington & Jefferson College

**Washington, Pennsylvania
Bachelor of Arts
Biology /English
1988**

PROFESSIONAL EXPERIENCE:

**Virginia Polytechnic Institute and State University
College of Natural Resources, Department of Forestry**

**Blacksburg, Virginia
2001 to Current**

Assistant Professor of Forest Resource Law and Policy

- ♦ Teaching and Research in the Areas of Resource Regulation, Public Land Management, Administrative Processes, and Environmental and Natural Resource Conflict.

Montana Department of Natural Resources & Conservation

**Missoula, Montana
1998 to 2001**

Special Assistant Attorney General

- ♦ Legal Counsel to the Trust Land Management and Forestry Divisions, Managing 5 Million Public Acres in Montana, and Regulating an Additional 6 Million Acres of Private Forest Land. Practice Included Litigation and Advising with an Emphasis in Natural Resource Issues
- ♦ Member of the Agency Management Team Responsible for the Development and Implementation of Resource Policies Affecting Old-Growth Forests, Threatened and Endangered Species, and Sustainable Forestry Practices.

**University of Montana
Bureau of Business and Economic Research**

**Missoula, Montana
1999 to 2001**

Forest Policy Analyst

- ♦ Research, Writing, and Editing in the Areas of Forest Health, Forest Management, and Forest Products in both State and Federal Settings.

Self-Employed

**Pittsburgh, Pennsylvania
1991 to 1996**

Attorney

- ♦ Solo Practitioner in the General Practice of Law
- ♦ Specialty in Indian Gaming and Video Gambling Law

REFEREED PUBLICATIONS (*supervised graduate student)

- Mortimer, M.J. 2006. Assessing the potential for congressional responsibility for national forest management. *Society and Natural Resources*. (forthcoming).
- Mortimer, M.J. and S. D. McLeod. 2006. Managing Montana's trustland old-growth forests: Practical challenges in implementing scientific policy. *Administration and Society* (forthcoming).
- Mortimer, M.J., S. Baker, and R. Shaffer. 2005. Assessing and understanding timber trespass and theft laws in the Appalachian region. *Northern Journal of Applied Forestry* 22(2):94-101.
- Prisley, S.P. and M.J. Mortimer. 2004. A synthesis of literature on evaluation of models for policy applications, with implications for forest carbon accounting. *Forest Ecology and Management*. 198(1-3):89-103.
- Mortimer, M.J., A.V. Scardina*, and D.H. Jenkins. 2004. Policy analysis and national forest appeal reform. *Journal of Forestry* 102(2):26-32.
- Mortimer, M.J. and R.J.M. Visser. 2004. Timber harvesting and flooding: Emerging legal risks and potential mitigations. *Southern Journal of Applied Forestry*. 28(2): 69-75.
- Mortimer, M.J. and B. Kane. 2004. Hazard tree liability in the United States: Uncertain risks for owners and professionals. *Urban Forestry and Urban Greening* 2(3):159-165.

LAW REVIEWS

- Mortimer, M.J., H. L. Haney, Jr., and J.J. Spink. 2003. When worlds collide: Science and policy at odds in the regulation of Virginia's private forests. *Journal of Natural Resources and Environmental Law*. 17(1):1-26.
- Mortimer, M.J. 2002. The delegation of law-making authority to the United States Forest Service: Implications in the struggle for national forest management. *Administrative Law Review* 54(3):907-982
- Mortimer, M.J. 1999. Condemnation without compensation: How environmental eminent domain diminishes the value of Montana's School Trust Lands. *Dickinson Journal of Environmental Law and Policy* 8(2):243-271.
- Mortimer, M.J. 1998. Irregular regulation under Section 404 of the Clean Water Act: Is the Congress or the Army Corps of Engineers to blame? *Journal of Environmental Law and Litigation* 13(2):445-474.

OTHER REVIEWED PUBLICATIONS

- Mortimer, M.J. and D.H. Jenkins. 2003. Forests at the fringe: Sustaining private forests by avoiding perverse incentives. *Journal of Multistate Taxation and Incentives* 12(10):28-37.
- Mortimer, M.J. 2002. Coming to grips with the legal and ethical components of forester licensing: An insider's view. *Journal of Forestry* 100(8):29-32.
- Mortimer, M.J. 2002. Local regulation of private forests. *Journal of Forestry* 100(7):8-9.

BOOK CHAPTERS

- Mortimer, M.J. 2004. *Forest Regulations in the United States: Evolving Standards for Conserving Forest Biodiversity in the Last 300 Years* in Forest Biodiversity: Lessons from History for Conservation. O.Honnay, K. Verheyen, B. Bossuyt and M. Hermy (eds.) CABI Publishing Wallingford, Oxon UK.

PROFESSIONAL AFFILIATIONS

Society of American Foresters	<i>Chair</i> , National Committee on Forest Policy (2003-2004) <i>Co-Chair</i> , Forest Practices Task Force (2003-current) <i>Appointee</i> , National Committee on Forest Policy (2002-2004) <i>Chair</i> , Virginia Policy Committee (2001-current) <i>Chair-elect</i> , Virginia Division (2005)
Virginia Forestry Association	<i>Member</i> , Governmental Affairs Committee (2002-current) <i>Member</i> , Woodland Security Task Force (2001-2003)
Forest Landowners Association	
American Bar Association	<i>Member</i> , Forest Resources Subcommittee
American Society for Public Administration	
International Association for Society & Natural Resources	

ACCREDITATIONS

1996 State Bar of Montana
1991 State Bar of Pennsylvania
1994 U.S. District Court, Western District of Wisconsin
1991 U.S. District Court, Western District of Pennsylvania

FELLOWSHIPS

Graduate Research Fellowship, Political Economy Research Center, Bozeman, Montana, 1998.

AWARDS

- Society of American Foresters, Appalachian Society, Young Forester Leadership Award, 2004
- Society of American Foresters, Appalachian Society, Young Forester Leadership Award, 2004.
- Society of American Foresters, Virginia Division, Young Forester Leadership Award, 2004.
- Director's Award for Superior Achievement, Montana Department of Natural Resources & Conservation, 2001.

**Committee on Agriculture
U.S. House of Representatives
Required Witness Disclosure Form**

House Rules* require nongovernmental witnesses to disclose the amount and source of Federal grants received since October 1, 2003.

Name: Dr. Michael J. Mortimer

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Organization you represent (if any): Society of American Foresters

- 1. Please list any federal grants or contracts (including subgrants and subcontracts) you have received since October 1, 2003, as well as the source and the amount of each grant or contract. House Rules do NOT require disclosure of federal payments to individuals, such as Social Security or Medicare benefits, farm program payments, or assistance to agricultural producers:**

Witness is employed by government: State of Virginia.

- 2. If you are appearing on behalf of an organization, please list any federal grants or contracts (including subgrants and subcontracts) the organization has received since October 1, 2003, as well as the source and the amount of each grant or contract:**

USDA Forest Service, Forest Inventory and Analysis User's Group (annually): average \$8,000
USDA Forest Service, Southern Research Station, Knowledge Acquisition Survey: \$8480

Please check here if this form is NOT applicable to you: _____

Signature: Michael J. Mortimer

** Rule XI, clause 2(g)(4) of the U.S. House of Representatives provides: Each committee shall, to the greatest extent practicable, require witnesses who appear before it to submit in advance written statements of proposed testimony and to limit their initial presentations to the committee to brief summaries thereof. In the case of a witness appearing in a nongovernmental capacity, a written statement of proposed testimony shall include a curriculum vitae and a disclosure of the amount and source (by agency and program) of each Federal grant (or subgrant thereof) or contract (or subcontract thereof) received during the current fiscal year or either of the two previous fiscal years by the witness or by any entity represented by the witness.*

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